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81-970

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN,
SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

INEZ WRIGHT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether federal courts may entertain equity suits against the Secretary of the Treasury brought by persons seeking to have the Treasury revise the rules under which it determines the eligibility of private schools for tax-exempt status, and to deny or revoke tax-exempt status of private schools claimed to have insufficient minority enrollment, where the plaintiffs allege no actual injury to themselves either by any private school or by the Treasury.

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INEZ WRIGHT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Treasury, and the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the district court (Interv. Pet. App. A 1a-15a)[1] is reported at 480 F. Supp. 790. The opinion of the court of appeals (Interv. Pet. App. B 1b-58b) is reported at 656 F.2d 820.

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[1] "Interv. Pet" refers to the petition for a writ of certiorari (No. 81-757) filed by the intervenor W. Wayne Allen, Chairman of the Board of Trustees of the Briarcrest School System in Memphis, Tennessee.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1981. The orders of the court of appeals denying the petition for rehearing (Interv. Pet. App. C) with suggestion for rehearing en banc (Interv. Pet. App. D) were entered on August 26, 1981. A petition for a writ of certiorari (No. 81-757) was filed on behalf of the intervenor W. Wayne Allen on October 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution, Section 501(a) and (c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.), Rev. Stat. 1977 (1878 ed.) (42 U.S.C. 1981), and Sections 103 and 615 of the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 562, 577, are set forth at Interv. Pet. 2-4. The relevant provisions of Article III of the Constitution and Section 170(a) and (c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Appendix A, *infra*.

Revenue Procedure 75-50, 1975-2 Cum. Bull. 587, the Proposed Revenue Procedure, and the Modified Proposed Revenue Procedure are set forth respectively at Interv. Pet. App. E 1e-12e, F 1f-13f, and G 1g-14g.

STATEMENT

A. Background

Since 1970, the Internal Revenue Service has uniformly taken the position that a private school will

not qualify as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954, or as an eligible donee of charitable contributions deductible under Section 170(c)(2) of the Code, unless it establishes that its admissions and educational policies are operated on a racially non-discriminatory basis. Rev. Proc. 75-50, 1975-2 Cum. Bull. 587 (Interv. Pet. App. E 1e-12e) sets forth the currently effective guidelines by which the Internal Revenue Service determines whether private schools seeking to acquire or maintain tax-exempt status have racially nondiscriminatory policies as to students.[2] The Revenue Procedure accordingly provides (§ 2.02) that "[a] school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith." The Revenue Procedure thereafter enumerates requirements that must be met by each school seeking to establish that it has adopted and is operating in accordance with a nondiscriminatory policy. Under the Revenue Procedure, a school seeking to acquire or retain tax-exempt status and eligibility for tax-deductible contributions must state in its charter documents, and catalogues that it has adopted a non-discriminatory policy; publicize that policy at least once annually so as to bring it effectively to the attention of all racial segments of the community; and maintain records documenting, *inter alia*, the racial composition of its

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[2] In 1976 and 1977, the Internal Revenue Service also issued more detailed guidelines for the use of revenue agents performing field audits of private schools. See 4 Administration, Internal Revenue Manual (CCH) ¶¶ 341.11-341.13, at 22,457-9—22,460.

students, faculty, and administrative staff. Officials of a school claiming the benefits of tax exemption are required to certify to the Internal Revenue Service each year, under penalties of perjury, that the school has complied with the guidelines (Interv. Pet. App. E 7e-8e).[3]

On August 22, 1978, the Internal Revenue Service published a proposed revenue procedure (see Interv. Pet. App. F 1f-13f) seeking to amplify its policy with respect to schools that had been held by a court or agency to be racially discriminatory, and schools that had an insignificant number of minority students and were formed or substantially expanded at or about the time of desegregation of the public schools in the community After lengthy administrative hearings and the receipt of a substantial number of adverse written comments, the Internal Rev-

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[3] See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158. See also *Prince Edward School Foundation* v. *Commissioner*, 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, No. 80-484 (Feb. 23, 1981) (non-religious private school denied tax-exempt status for failure to make requisite showing that it maintained a racially nondiscriminatory admissions policy where no black child had been admitted for a period of almost 20 years; directors' belief in the value of segregated education does not excuse failure to make requisite showing of nondiscriminatory policy).

The Internal Revenue Service's position is before the Court in two cases presenting the question whether nonprofit corporations operating private schools that, on the basis of religious doctrine, maintain racially discriminatory admissions policies and other racially discriminatory practices qualify as tax-exempt organizations under Section 501(c)(3) of the Code. See *Goldsboro Christian Schools, Inc.* v. *United States*, No. 81-1, and *Bob Jones University* v. *United States*, cert. granted, No. 81-3 (Oct. 13, 1981).

enue Service issued a revised proposal on February 9, 1979 (Interv. Pet. App. G 1g-14g).

The Internal Revenue Service's proposals led to the enactment of two related provisions that Congress included in the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559. In Section 615 (93 Stat. 577), known as the Dornan Amendment, Congress stipulated that none of the funds made available by the Act be used to carry out the proposed revenue procedures of 1978 and 1979. In Section 103 (93 Stat. 562), of the same Act, known as the Ashbrook Amendment, Congress provided that none of the funds made available by the Act be used "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978." The district court observed that "[t]he effect of [this congressional] action is to retain in effect, at least until September, 1980, the presently effective Rev. Proc. 75-50 * * *" (Interv. Pet. App. A 14a).

B. The Proceedings in this Case

1. Respondents are the parents of 25 black school children who attend public school in seven states, and claim to represent a nationwide class of "several million individuals" (Interv. Pet. App. A 1a). They brought this action in the United States District Court for the District of Columbia against the Secretary of the Treasury and the Commissioner of Internal Revenue, alleging that these federal officials "have fostered and encouraged the development, oper-

ation and expansion of * * * racially segregated private schools by granting them, or the organizations that operate them, exemptions from federal taxation * * *" (A. 10).[4]

Respondents alleged that the actions of the federal officials injured them and their class, and claimed injury in the following two respects, "First, the exemptions constitute tangible financial aid and other assistance to racially segregated education. Second, the exemptions foster and encourage the development of institutions offering racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts, and thereby also interfere with the efforts of federal courts, HEW and local school authorities to desegregate racially dual school systems" (A. 11).

Although their complaint asserted that "thousands of newly created and many existing private schools have provided racially segregated alternative educational opportunities for white children avoiding attendance in desegregating school systems" (A. 9), it identified only 19 private schools that respondents claim to be "racially segregated."[5] Respondents

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[4] "A." refers to the appendix filed in the court of appeals.

[5] Respondents apparently use the term "racially segregated" to signify only that there are few or no black students in attendance at a particular school, and not to signify that the absence of blacks is attributable to racial exclusion practices. At a hearing in the district court, counsel for respondents conceded that he did not know whether any of the black children who are parties to this action would be denied admission by any private school on the basis of race (Tr. of Motion of Defendants to Dismiss, Nov. 20, 1979, at 66-67).

The complaint identifies a number of private schools that respondents alleged to fit this description: Harding Academy, Briarcrest Baptist School System and the Southern Baptist

sought declaratory and injunctive relief requiring the federal officials to deny all applications for tax-exempt status for, and to revoke tax exemptions held by all private schools "which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts" (A. 11) and which either (A. 37)—

(1) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating;

(2) have been determined in adversary judicial or administrative proceedings to be racially segregated; or

(3) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems.

Respondents further requested the court to grant injunctive relief in the nature of mandamus requiring the federal officials to revise Rev. Proc. 75-50 and to substitute the criteria that they urge as the governing standard for granting tax exempt status to private schools (A. 37).

Schools of Whitehaven, Inc., Memphis, Tennessee; Natchitoches Academy, Natchitoches Parish, Louisiana; Delta Christian Academy and Tallulah Academy, Madison Parish, Louisiana; River Oaks School, Monroe, Louisiana; Holly Hill Academy and Bowman Academy, Orangeburg, South Carolina; Sea Pines Academy, Beaufort County, South Carolina; Prince Edward Academy, Prince Edward County, Virginia; Montgomery Academy and St. James Parish School, Montgomery, Alabama; Camelot Parochial School, Cairo, Illinois; Hyde Park Academy, South Boston Heights Academy and Parkway Academy, Boston, Massachusetts. These schools are said to serve the desegregating public school districts where the minor respondents attend school (A. 20-34).

2. The district court dismissed respondents' suit on three separate grounds. First, it concluded that respondents had no standing to bring the action because: (a) they had not asserted a distinct, palpable, and concrete injury; (b) they had not shown that their alleged injury was attributable to the federal officials' actions; (c) there was no certainty that the relief requested would remove the injury; and (d) there was not a sufficient degree of concrete adverseness between respondents and the federal officials (Interv. Pet. App. A 4a-11a).

In so ruling, the court relied principally on this Court's decision in *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). The court noted that respondents had not alleged that any of the private schools cited in the complaint was actually discriminating in violation of the Constitution or of federal law, or that any of them or their children had suffered any discriminatory action or exclusion. It questioned whether enforcement of respondents' proposed guidelines would ultimately cause any of these schools to lose tax-exempt status that it would have otherwise retained. Furthermore, even though the implementation of respondents' guidelines might ultimately serve to deprive some schools of their exempt status, the court found that respondents had not shown that the loss of exemptions would produce a net change in the desegregation of any particular school district. The court accordingly concluded that respondents had failed to show any nexus between the Internal Revenue Service's position and the injury allegedly suffered. Rather, the court observed that it appeared probable that any schools forced to choose would elect to forgo their exempt status rather than terminate any discriminatory practices (Interv. Pet. App. A 9a-10a).

Second, the district court ruled that responent's action was "barred by the doctrine of nonreviewability" because it "would require this Court to undertake detailed or continuing review of a generalized IRS enforcement program, or to review complex issues of tax enforcement policy and of agency resource allocation" (Interv. Pet. App. A 11a). As the district court saw the matter, "Such action would be tantamount to this Court becoming a 'shadow Commissioner of Internal Revenue' to run the administration of tax assessments to private schools in the United States" (*id.* at 12a).

Finally, the district court concluded that the enactment in 1979 of the Ashbrook and Dornan Amendments to the General Appropriations Act "are the strongest possible expressions of the Congressional intent that Section 501(c)(3) of the Internal Revenue Code is not susceptible of the construction which [respondents] would place upon it in this case" (*id.* at 14a-15a). While the court acknowledged that the Ashbrook and Dornan Amendments apparently allow a federal court to fashion a remedy in this area, it concluded that it was "not the business of a federal court to explicitly thwart the will of Congress or to otherwise fail to carry it out" (*id.* at 15a).

3. A divided panel of the court of appeals reversed (Interv. Pet. App. B 1b-58b). It held that respondents had standing to sue and remanded the case for further proceedings. In so ruling, the court acknowledged that this Court's decision in *Simon* v. *Eastern Ky. Welfare Rights Organization*, *supra*, 26, leaves "the door barely ajar for third party challenges" (Interv. Pet. App. B 16b) of the tax treatment of others. It also recognized that its own previous decisions had dismissed for lack of standing suits

brought by persons who sought to litigate the tax status of other parties.[6]

But the court concluded that other precedent of this Court points in the opposite direction and indicates "that black citizens have standing to complain against government action alleged to give aid or comfort to private schools practicing race discrimination in their communities" (Interv. Pet. App. B 15b-16b). See *Coit* v. *Green*, 404 U.S. 997, aff'g *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. (1971)); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). In the court's view, those cases "recognized the right of black citizens to insist that their government 'steer clear' of aiding schools in their communities that practice race discrimination" (Interv. Pet. App. B 24b-25b). The court therefore ruled that because of "the centrality of that right in our contemporary (post-Civil War) constitutional order, [it was] unable to conclude that *Eastern Kentucky* speaks to the issue before us" (*ibid.*).

In addition, the court found no impediment to the action in the other grounds of the district court's decision dismissing the suit. It concluded that the doctrine of nonreviewability did not preclude adjudication of respondents' claims because they derived ultimately from constitutional concerns that courts, as opposed to administrators, were better equipped to address (Interv. Pet. App. 32b-35b). Nor did it view the Ashbrook and Dornan amendments as prohibitions upon fashioning a remedy. The amendments, as it construed them, were merely interim

[6] See *American Society of Travel Agents* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978); *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). See also *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978).

stop orders on agency initiatives and did not purport to control judicial dispositions (*id.* at B 25b-30b).

In dissent, Judge Tamm deemed *Eastern Kentucky* controlling. Finding that respondents had failed to allege a distinct and palpable injury to themselves, or a sufficient nexus between the Internal Revenue Service's actions and whatever injury they claimed to have suffered, Judge Tamm would have denied them standing to maintain their suit. In his view, the majority's opinion reflected an impermissible shift in focus from the right of respondents to make their claims to the rights they wished to assert. The majority, he concluded, had not only expanded significantly the law of standing, but had also overstepped the constitutional limits of its jurisprudential power (Interv. Pet. App. B 38b-58b).

REASONS FOR GRANTING THE PETITION

In holding that respondents had standing to bring this suit in which they seek to compel the Department of the Treasury to revise its rules governing the eligibility of private schools for tax-exempt status and to deny such status to schools having what they deem to be insufficient minority enrollment, the decision below refused to follow the squarely applicable precedent of *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), in which this Court unanimously reversed the same court of appeals that decided the instant case. The expansive view of standing adopted by the court of appeals seriously erodes the previously settled "case or controversy" limitation of the Article III jurisdiction of the federal courts, and once again threatens the orderly administration of the revenue laws and the system

established by Congress for the adjudication of tax disputes. This Court should grant certiorari to dispel the uncertainty in the law of standing created by the decision below.

1. a. In *Eastern Kentucky*, as here, the plaintiffs sued to contest the Treasury's administration of Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954, not as it affected their own taxes but as it affected the tax treatment of private institutions not before the court, *viz.*, hospitals that allegedly had denied free medical care to the indigent plaintiffs. The plaintiffs in that case likewise alleged that the Secretary of the Treasury and the Commissioner of Internal Revenue had improperly conferred tax-exempt status to institutions that were not entitled to them under the Constitution and the tax laws, and thereby "encouraged" hospitals to deny services to indigents.

This Court held that the plaintiffs in that virtually identical posture lacked standing to have their claims adjudicated in a federal court. As the Court reaffirmed, "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court" (426 U.S. at 41-42). There, it was "purely speculative whether the denials of service specified in the complaint fairly can be traced to [the Treasury's] 'encouragement' or instead result from the decisions made by the hospitals without regard to the tax implications" (*id.* at 42-43.) Moreover, "[i]t [was] equally speculative whether the desired exercise of the court's remedial powers in [that] suit would result in the availabil-

ity to [the plaintiffs] of such services" (*ibid.*). In these circumstances, the Court held that the plaintiffs lacked standing because they had not shown that "the asserted injury was the consequence of the defendants' actions; or that prospective relief will remove the harm." *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975).

Eastern Kentucky governs this case. Indeed, unlike the plaintiffs in *Eastern Kentucky* who alleged that they were denied medical treatment by particular hospitals, respondents' generalized and attenuated allegations concerning the practices of unidentified private schools do not even demonstrate injury in fact. As the district court pointed out, "there is no allegation in the record before the Court that the 'target schools' are actually discriminating in violation of the Constitution or federal law" (Interv. Pet. App. A 5a-6a). Nor do respondents allege that a judgment in their favor would redress any injury that fairly can be attributed to the challenged action of the Treasury defendants. In this respect, the court of appeals acknowledged that "[respondents] do not dispute that it is 'speculative,' within the *Eastern Kentucky* frame, whether any private school would welcome blacks in order to retain tax exemption or would relinquish exemption to retain current practices. They claim indifference as to the course private schools would take" (Interv. Pet. App. B 18b). While respondents are free to profess indifference to the response of the private schools whose policies they decry, "[a] federal court, properly cognizant of the Art. III limitation upon its jurisdiction, must require more than respondents have shown before proceeding to the merits." *Simon* v. *Eastern Ky. Welfare Rights Organization*, *supra*, 426 U.S. at 46.

b. Although the court of appeals acknowledged that *Eastern Kentucky* "suggests that litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges" (Interv. Pet. App. B 16b), it concluded "that *Eastern Kentucky* is not the line appropriately followed in the matter before us" (*id.* at 18b). In the court's view, *Eastern Kentucky* was distinguishable because respondents do not assert "a claim for relief against private actors" (*ibid.*) but rather against the government.

But the plaintiffs in *Eastern Kentucky* did not assert a claim against the private hospitals. Like respondents, they sued the Secretary of the Treasury to compel a change in the rules governing the tax exemption accorded to private hospitals that were claimed to have injured the plaintiffs. Thus, *Eastern Kentucky* is squarely in point because both suits sought a change in governmental conduct. If there is any difference between the two cases, it is, as we have pointed out (*supra*, pages 6, 8, 13), that respondents have not even asserted any injury at the hands of the Treasury or any private school—a fact that the court of appeals conceded in stating that respondents "do not allege that any particular school turns away students on the basis of race" (Interv. Pet. App. B 22b n.27). Thus, respondents' suit is even further removed from meeting the prerequisites of standing than the plaintiffs' claim dismissed by this Court in *Eastern Kentucky*.

There is, moreover, no basis for the court of appeals' conclusion that "the standing analysis should remain unaffected so long as plaintiffs have a right to demand that their government 'steer clear' of aiding discrimination in local educational facilities and contend, as plaintiffs do here, that current gov-

ernment (IRS) practice does not meet the "steer clear' standard" (Interv. Pet. App. B 22b n.27). Respondents' asserted right to be free of government aid to racial discrimination is an undifferentiated right common to all members of the public that will not support standing to sue Treasury officials in an Article III court. See *United States* v. *Richardson*, 418 U.S. 166, 176-180 (1974). The fact that respondents may have an interest in a matter that they have sought to identify as a public issue, and that they may share certain attributes common to persons who may have suffered discrimination at the hands of private schools, is an insufficient ground upon which to conclude that they have been injured in fact by such discrimination or that the Secretary's allegedly illegal conduct has actually caused such discrimination. *Warth* v. *Seldin*, *supra*, 422 U.S. at 502. In short, respondents are "individuals who seek to do no more than vindicate their own value preference through the judicial process." *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972). See also *O'Shea* v. *Littleton*, 414 U.S. 488, 493-496 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-168, 171, 178 (1972).

c. In refusing to follow *Eastern Kentucky*, the court of appeals declined to "search for a grand solution that will unclutter this area of the law and lead to secure, evenhanded adjudication" (Interv. Pet. App. B 16b). Rather, it "select[ed] from two divergent lines of Supreme Court decision[s] the one [it] believe[d] best fit[] the case before [it]" and concluded that there was precedent to support the proposition that "black citizens have standing to complain against government action alleged to give aid or comfort to private schools practicing race dscrimination in their communities" (*ibid.*).

But the law of standing does not turn upon the racial characteristics of the plaintiff or the substantive issues raised by the complaint. "Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' " *Simon* v. *Eastern Ky. Welfare Rights Organization*, *supra*, 426 U.S. at 37-38, quoting from *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). See also *Warth* v. *Seldin*, *supra*, 422 U.S. at 517-518; *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 225-227 (1974). Hence, respondents are subject to precisely the same requirement as any other plaintiff and therefore must allege " 'such a personal stake in the outcome of the controversy as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf' ". *Warth* v. *Seldin*, *supra*, 422 U.S. at 498-499, quoting from *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

There are, moreover, no "divergent lines of Supreme Court decision" (Interv. Pet. App. B 16b), as the court of appeals mistakenly believed, that "point[] in opposite directions" (*id.* at 15b-16b), or that cast doubt upon the standing analysis of *Eastern Kentucky*. In proposing its novel hypothesis that black citizens can more easily invoke federal-court jurisdiction to remedy alleged governmental aid to private discrimination without demonstrating injury and a nexus between injury and the defendant's conduct, the decision below relied on *Green* v. *Kennedy*, 309 F. Supp. 1127 (1970), continued, 330 F. Supp. 1150 (D.D.C.), aff'd, 404 U.S. 997 (1971);

Norwood v. *Harrison*, 413 U.S. 455 (1973); and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974).

But none of those cases warrant, much less dictate, the conclusion that respondents have standing to bring this suit. Neither the Court's summary affirmance in *Green* nor its opinion in *Norwood* v. *Harrison* addressed the standing of the plaintiffs in those cases. Indeed, unlike this case where the respondents' quarrel with the Internal Revenue Service is over the effectiveness of its enforcement proceedures rather than its substantive position,[7] the *Green* litigation was initiated to obtain a ruling that racially discriminatory schools were not entitled to tax exemption under Section 501(c)(3). There, the plaintiffs identified in their complaint specific private schools in their communities "from which Negro students [were] excluded on the basis of color" (Interv. Pet. App. B 4b). Moreover, because the Service adopted the complainants' position in the midst of the litigation, "the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy." *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n.11 (1974).[8]

Norwood v. *Harrison*, *supra*, is similarly inapposite on the question of standing. There, the Court

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[7] We are advised that the Internal Revenue Service has revoked the tax exemption of more than 100 private schools that have failed to adopt and publicize racially nondiscriminatory policies.

[8] The appeal in *Green* was taken by intervenors appealing from an order denying their motion to set aside the district court's previous order. The intervenors sought to vindicate their asserted right to freedom of association. See Motion to Dismiss or Affirm, *Coit* v. *Green* (No. 820, 1970 Term).

struck down a state program under which students borrowed textbooks without regard to whether the students attended private schools with racially discriminatory policies. As the Court subsequently explained in *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 570-571 n.10 (1974), "[t]he plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered."

The same observation is equally applicable to *Gilmore*, which was related to a prior class action to desegregate public parks and recreational facilities. Indeed, contrary to the decision below, the Court's discussion of standing in *Gilmore* fully supports our submission that all plaintiffs must meet the traditional requisites of standing to invoke federal-court jurisdiction. As the Court stated, "[w]ithout a properly developed record, it is not clear that every nonexclusive use of city facilities by school groups, unlike their exclusive use, would result in cognizable injury to these plaintiffs. The District Court does not have carte blanche authority to administer city facilities simply because there is past or present discrimination. The usual prudential tenets limiting the exercise of judicial power must be observed in this case as in any other (*ibid.*)." See also *Warth* v. *Seldin*, *supra*.

2. a. The broad authority that Congress has given the Secretary of the Treasury and the Commissioner of Internal Revenue over the administration of the tax laws shows that it did not intend the courts to entertain suits of this kind. To adjudicate respondents' generalized claims, a broad-scale inquiry into the enforcement practices of the Internal Revenue Service, as well as into the racial policies of an indefinite number of private schools, would be re-

quired.[9] The role respondents would assume and have the court assume, "as virtually continuing monitors of the wisdom and soundness of Executive action," *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972), belongs to Congress in the exercise of its oversight function over the operation, administration, and effects of the internal revenue system (see Sections 8021 through 8023 of the Internal Revenue Code of 1954) and to the President, who, along with the Treasury officials, is required to "take Care that the Laws be faithfully executed." United States Constitution, Article II, Section 3; 26 U.S.C. 7801(a), 7805(a). Absent an assertion of concrete and remediable injury directly attributable to unlawful government action, the judiciary should not assume the "amorphous [task of] general supervision of the operations of government * * *." *United States* v. *Richardson, supra*, 418 U.S. at 192 (Powell, J., concurring); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 217-223 (1974).

Indeed, the structure for the adjudication of tax disputes shows that Congress established precisely defined channels for the conduct of the litigation that do not permit third parties such as respondents to challenge the tax treatment of others. The federal district courts and the Court of Claims have jurisdiction over actions by the affected taxpayer for refunds of taxes paid. 26 U.S.C. 6532, 7422; 28 U.S.C. 1346, 1491. And the Tax Court has been granted jurisdiction to review deficiency determinations with respect to income, estate, or gift tax, at the behest

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[9] We are advised by the Internal Revenue Service that there are approximately 20,000 private schools in the United States currently recognized as, or claiming to be, tax-exempt under Section 501(c)(3) of the Internal Revenue Code.

of the affected taxpayer. 26 U.S.C. 6212, 6213. In order to confine tax litigation to these prescribed avenues of review, Congress has generally prohibited "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a "suit for the purpose of restraining the assessment or collection of any tax" (26 U.S.C 7421 (a), the Anti-Injunction Act) and has prohibited declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. 2201). This Court has repeatedly required that those and other limitations on the channels of tax litigation be strictly enforced so as to accomplish their intended purpose. *Louisiana* v. *McAdoo*, 234 U.S. 627 (1914); *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974); *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962); *Flora* v. *United States*, 362 U.S. 145 (1960); *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293 (1945); *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269 (1931). Moreover, Congress has recently confirmed that the prohibitions against equity suits against the Treasury in tax matters remain fully operative in suits for review of agency action. S. Rep. No. 94-996, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 12-13 (1976). In sum, the structure of our tax system confirms the correctness of Justice Stewart's observation that he "cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the tax liability of someone else." *Simon* v. *Eastern Ky. Welfare Rights Organization*, *supra*, 426 U.S. at 46 (Stewart, J., concurring).

b. Of course, we do not suggest that policies of the Internal Revenue Service should be immune from public inquiry and examination. The broad tax

policy questions raised by respondents' suit are properly a matter for public debate. However, the appropriate forum for such a debate concerning the correctness of Treasury policy is in the Congress pursuant to the exercise of its oversight of the Department of the Treasury and not in the courts. "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *United States* v. *Richardson*, *supra*, 418 U.S. at 179.

Indeed, public debate has recently been taking place in Congress over the Treasury's enforcement policies in the area of tax exemptions of private schools, thereby confirming our submission that respondents' suit is not appropriate for judicial resolution. The Internal Revenue Service has already sought to supplement its existing procedures for testing the bona fides of the racial policies of private schools by proposing to treat as prima facie discriminatory schools formed in the wake of desegregation decrees or adjudicated in the past to be discriminatory (Interv. Pet. App. F 1f-13f; Pet App. G 1g-14g). Had they been adopted, those proposals apparently would have gone far toward meeting respondents' objections to the current procedures. They provoked, however, a large volume of adverse testimony before the Internal Revenue Service and Congress. See *Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (1979). In the wake of the hearings, the House Committee on Appropriations recommended that adoption of the Internal Revenue Service's proposals be deferred until after the regular taxwriting com-

mittees of Congress had determined that they represented a proper interpretation of the tax laws. H.R. Rep. No. 96 248, 96th Cong., 1st Sess. 14-15 (1979). By means of the so-called Ashbrook and Dornan Amendments to the 1980 Treasury Appropriations Act, Congress prohibited the Treasury, for fiscal year 1980, from expending funds to carry out any private school procedure, standard, or guidelines more preclusive than those in effect before August 22, 1978, the date of issuance of the first of the proposed procedures. Sections 103 and 615, Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 562, 576.[10]

Congress has continued to exercise its oversight authority in this area. After the court of appeals rendered its opinion in this case, in which it observed that the Ashbrook-Dornan restrictions then in effect did not purport to control court orders (Interv. Pet. App. B 30b), the House of Representatives added to the 1982 Treasury Appropriations bill a spending restriction that would specifically encompass court orders entered after August 22, 1978.[11] See 127

[10] The Ashbrook-Dornan Amendment expired on October 1, 1980, the end of the 1980 fiscal year, but was reinstated for the period December 16, 1980, through the close of the 1981 fiscal year, by Sections 101(a)(1) and 101(a)(4), H.R. J. Res., 644 of Dec. 16, 1980, Pub. L. No. 96-536, 94 Stat. 3166, as amended by Section 401, Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97-12, 95 Stat. 95.

[11] The House voted to modify the 1980 Ashbrook amendment by inserting the phrase "court order" to an amendment to the Treasury, Postal Service, and General Government Appropriations Bill, 1982 (H.R. 4121, 97th Cong., 1st Sess. (1981)). The bill, which has yet to pass both Houses, thus provides in Section 616:

> None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out

Cong. Rec. H5392-H5398 (daily ed. July 30, 1981). The Senate Committee on Appropriations subsequently reported out a spending restriction in identical form. Under a joint resolution making continuing appropriations for the current fiscal year, this provision became effective as of October 1, 1981, at least through November 20, 1981. Section 101(a)(3), H.R. J. Res. 325, Pub. L. No. 97-51, 95 Stat. 958, signed Oct. 1, 1981; see 127 Cong. Rec. H6698-H6699, H6702 (daily ed. Sept. 30, 1981).[12] These actions by Congress suggest that it is the appropriate forum for the resolution of respondents' quarrel with the Treasury and reinforce the wisdom of "the basic principle that to invoke judicial power the claimant must have 'a personal stake in the outcome,' * * *, or a 'particular, concrete injury' or 'a direct injury,' * * * in short, something more than 'generalized grievances' * * *" (citations omitted) *United States* v. *Richardson*, *supra*, 418 U.S. at 179-180.

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any rule, policy, procedure, guideline, regulation, standard, court order, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

[12] Those congressional restrictions are prospective in operation and therefore do not impair the Commissioner's right to use his existing guidelines and procedures established prior to August 22, 1978 (*e.g.*, Rev. Proc. 75-50, 1975-2 Cum. Bull. 587), to deny tax benefits to schools not operating under a bona fide nondiscriminatory policy. See *Bob Jones University* v. *United States*, 639 F.2d 147, 150, n.3 (4th Cir. 1981), cert. granted, No. 81-3 (Oct. 13, 1981). See also Interv. Pet. App. B 26b & n.35, 27b-28b, n.40).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1981

APPENDIX

Constitution of the United States of America

Article III.

* * * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C.):

Section 170 CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) *Allowance of Deduction.*—

(1) *General rule.*—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

* * * * *

(c) [as amended by Section 201, Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487] *Charitable Contribution Defined.*—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment) or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

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Opposition

SEE COMPANION CASE

Docket Sheet

No. 81-970-CFX
Status: GRANTED

Title: Donald T. Regan, Secretary of the Treasury, et al., Petitioners
v.
Inez Wright, et al.

Docketed:
November 23, 1981

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
81-757

Counsel for petitioner: Solicitor General, Landers, William J.

Counsel for respondent: Chachkin, Norman J., Kapp, Robert H.

Entry	Date	Note	Proceedings and Orders
1	Nov 23 1981	G	Petition for writ of certiorari filed.
2	Dec 28 1981		Brief of respondents Inez Wright, et al in opposition filed. VIDED.
3	Jan 6 1982		DISTRIBUTED. January 22, 1982
4	Jun 13 1983		REDISTRIBUTED. June 16, 1983
5	Jun 20 1983		Petition GRANTED. The case is consolicated with 81-757 and a total of one hour is allotted for oral argument.
			**********
7	Jul 25 1983		Order extending time to file brief of petitioner on the merits until September 3, 1983.
8	Aug 8 1983		Joint appendix filed. VIDED.
9	Aug 11 1983		Record filed.
10	Aug 11 1983		Certified original record & C.A. proceedings received.
11	Sep 2 1983		Brief of petitioner W. Wayne Allen filed. VIDED.
12	Sep 2 1983		Order further extending time to file brief of petitioner on the merits until September 16, 1983.
13	Sep 16 1983		Brief amicus curiae of U.S. Catholic Conferece filed. VIDED.
14	Sep 16 1983		Brief of petitioners Donald T. Regan, et al. filed. VIDED.
16	Sep 26 1983		Order extending time to file brief of respondent on the merits until October 19, 1983.
17	Sep 29 1983	G	Motion of the Solicitor General for civiced argument filed.
18	Oct 11 1983		Motion of the Solicitor General for civiced argument GRANTED.
19	Oct 12 1983		Order further extending time to file brief of respondent on the merits until November 2, 1983.
20	Nov 2 1983		Brief amicus curiae of NAACP, et al. filed. VIDED.
21	Nov 2 1983		Brief of respondents Inez Wright, et al. filed. VIDED.
22	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 29, 1984. This case is consolidated with No. 81-757. (1 hour) (1st case)
23	Jan 11 1984		CIRCULATED.
24	Feb 16 1984	X	Reply brief of petitioners Donald T. Regan, et al. filed. VIDED.
25	Feb 29 1984		ARGUED.